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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Kenmark Optical Company

Serial No. 76/203,682

Jack A. Wheat of Stites & Harbison PLLC for Kenmark Optical Company.

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Before Cissel, Hanak and Drost, Administrative Trademark Judges.

Opinion by Drost, Administrative Trademark Judge:

Kenmark Optical Company (applicant) filed an application to register the mark SPORTZ (in typed form) on the Principal Register for goods ultimately identified as "eyewear, namely, goggles for use in a wide variety of indoor and outdoor athletic activities" in International Class 28.¹

¹ Serial No. 76/203,682, filed February 2, 2001. The application contains an allegation of a bona fide intention to use the mark in commerce.

The examining attorney refused registration under Section 2(e)(1) on the ground that applicant's mark is merely descriptive of the identified goods. 15 U.S.C. § 1052(e)(1). When the examining attorney made the refusal to register final, applicant filed a notice of appeal.

The examining attorney's² position is that the primary significance of the term "SPORTZ" in relation to the identified goods is a reference to athletic activities. "The goggles are clearly worn for use in athletic activities. As such they are 'sports goggles.'" Brief at 2. Applicant, on the other hand, maintains that it is "only claiming *extremely narrow* protection for the peculiar spelling SPORTZ" and the term is a double entendre "because it has more than one meaning. Rather than solely athletic endeavors, SPORTZ is synonymous with 'wears,' 'shows off' or 'has on.'" Brief at 3 (emphasis in original).

We affirm.

A mark is merely descriptive if it immediately describes the ingredients, qualities, or characteristics of the goods or services or if it conveys information regarding a function, purpose, or use of the goods or services. In re Abcor Development Corp., 588 F.2d 811, 200

² The current examining attorney was not the original examining attorney in this case.

USPQ 215, 217 (CCPA 1978). See also In re Nett Designs, 236 F.3d 1339, 57 USPQ2d 1564, 1566 (Fed. Cir. 2001). We look at the mark in relation to the goods or services, and not in the abstract, when we consider whether the mark is descriptive. Abcor, 200 USPQ at 218. Courts have long held that, to be "merely descriptive," a term must only describe a single significant quality or property of the goods. In re Gyulay, 820 F.2d 1216, 3 USPQ2d 1009, 1010 Fed. Cir. 1987); Meehanite Metal Corp. v. International Nickel Co., 262 F.2d 806, 120 USPQ 293, 294 (CCPA 1959).

The examining attorney has included evidence of third-party registrations that the term "sports" is merely descriptive when applied to eyewear used in a variety of indoor and outdoor athletic activities. Registration Nos. 2,248,822; 1,916,969; and 2,143,223 all contain a disclaimer of the term "sport[s]" when used in association with eyewear and eyewear-related retail services. In addition, applicant's website describes its SPORTZ eyewear as:

Impact tested frames designed just for the high-energy sports crowd. There's nothing like the added security of shock absorbing eyewear.

Applicant itself asserts that it is only claiming protection for the "peculiar spelling SPORTZ" (Brief at 3) and that the term SPORTZ "is not the word 'sports' used in

a merely descriptive sense" (Brief at 2). Therefore, there is no serious dispute that the term "sports" is merely descriptive of eyewear used in athletic activities.³

The next question is whether the slight misspelling of the term "sports" to "sportz" results in the term becoming not merely descriptive for the goods. The Supreme Court has held that:

The word, therefore is descriptive, not indicative of the origin or ownership of the goods; and being of that quality, we cannot admit that it loses such quality and becomes arbitrary by being misspelled. Bad orthography has not yet become so rare or so easily detected as to make a word the arbitrary sign of something else than its conventional meaning...

Standard Paint Co. v. Trinidad Asphalt Mfg. Co., 220 U.S. 446, 455 (1911).

Other cases have recognized that a slight misspelling does not change a merely descriptive term into a suggestive term. See Armstrong Paint & Varnish Works v. Nu-Enamel Corp., 305 U.S. 315 (1938) (NU-ENAMEL; NU held equivalent of "new"); In re Quik-Print Copy Shops, 616 F.2d 523, 205 USPQ 505, 507 n.9 (CCPA 1980) (QUIK-PRINT held descriptive; "There is no legally significant difference here between 'quik' and 'quick'"); Hi-Shear Corp. v. National Automotive Parts Association, 152 USPQ 341, 343 (TTAB 1966) (HI-TORQUE

³ Indeed, applicant has offered to disclaim the term "sports." Request for Reconsideration at 1.

"is the phonetic equivalent of the words 'HIGH TORQUE'"); and In re Organik Technologies Inc., 41 USPQ2d 1690, 1694 (TTAB 1997) (ORGANIK "is the phonetic equivalent of the term 'organic'").

Similarly here, applicant's mark merely spells the word "sports" with a "z" instead of a final "s." This simple misspelling does not change the commercial impression or the way prospective purchasers would view the term. Fleetwood Co. v. Mende, 298 F.2d 797, 132 USPQ 458, 460 (CCPA 1962) ("TINTZ [is] a phonetic spelling of 'tints'"). See also King-Kup Candies, Inc. v. King Candy Co., 288 F.2d 944, 129 USPQ 272, 273 (CCPA 1961) ("It is clear, therefore, that the syllable 'Kup,' which is the full equivalent of the word 'cup,' is descriptive"); Andrew J. McFarland, Inc. v. Montgomery Ward & Co., 164 F.2d 603, 76 USPQ 97, 99 (CCPA 1947)(KWIXTART merely descriptive for electric storage batteries); Norsan Products Inc. v. R.F. Schuele Corp., 286 F. Supp. 12, 159 USPQ 689 (E.D. Wis. 1968) (KUF'N KOLAR equivalent of "cuff and collar").

Applicant argues that the term "sports" has a double entendre because it also can mean to wear apparel or accessories. If a misspelling "involves more than simply a misspelling of a descriptive or generic word," it may not be merely descriptive. In re Grand Metropolitan

Foodservices Inc., 30 USPQ2d 1974, 1975 (TTAB 1994)

(Applicant's "MufFuns" (stylized) mark has a different commercial impression than the generic term "muffin"). See also In re Priefert Mfg. Co., 222 USPQ 731, 733 (TTAB 1984)

(Applied-for mark "HAY DOLLY" reminiscent of the famous Broadway hit "HELLO DOLLY"). Here, the term "sports" or "sportz," when applied to eyewear used in athletic or sporting events, does not create a significant double entendre. See In re Volvo Cars of North America Inc., 46 USPQ2d 1455, 1460 (TTAB 1998) ("We hasten to add that to the extent that applicant's designation DRIVE SAFELY engenders some minor double entendre, this should not result in registration inasmuch as the primary significance of the phrase remains that of a commonplace safety admonition"). Similarly, while applicant's term could have other meanings, applicant's goods are, in effect, sports goggles. The term "sports" or "sportz," when used with these goods, would immediately inform prospective purchasers that, in the words of applicant's website, applicant's eyewear is "designed for the high-energy sports crowd." See Thompson Medical Company, Inc. v. Pfizer, 753 F.2d 208, 225 USPQ 124, 131 (2d Cir. 1985) (SPORTSCREME held descriptive for topical analgesic. "No exercise of the imagination is necessary for the public to understand

that the product is a cream useful in connection with sports. Marks that describe the use to which a product is put are descriptive.")

Therefore, applicant's mark SPORTZ is merely descriptive under Section 2(e)(1) of the Trademark Act of a feature or characteristic of applicant's goggles used in a wide variety of indoor and outdoor athletic activities.

Decision: The examining attorney's refusal to register applicant's mark on the ground that it is merely descriptive of the identified goods is affirmed.